82-2039
No.

IN THE

Supreme Court of the United States

October Term, 1982

JOHN O'NEILL,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Whether the mere provision of lawful goods or services to members of a conspiracy is sufficient to render the purveyor liable as a conspirator or an aider and abettor where there has been no demonstration that the purveyor was an intentional participant with a "stake in the venture".

Parties to the Proceeding

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were John O'Neill, petitioner herein, and Joseph Maschi.

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Petitioner John O'Neill respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Feinberg, C.J., Meskill and Timbers, JJ.) (Appendix, *infra,* at pp. 1a-4a) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on April 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 20.1 of the Rules of this Court.

Statutes Involved

18 U.S.C. § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

21 U.S.C. § 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Statement of the Case

Petitioner was convicted after trial by jury before the United States District Court for the Eastern District of New York (Mishler, J.) of conspiracy to violate the federal narcotics laws (21 U.S.C. § 846), unlawful importation of narcotics (cocaine) (21 U.S.C. §§ 952(a) and 960(a)(1)), and possession with intent to distribute narcotics (cocaine) (21 U.S.C. § 841 (a)(1)). Petitioner was sentenced to concurrent indeterminate terms of four years imprisonment, cumulative fines of $7,500 and a special parole term of six years. The conviction was affirmed by the United States Court of Appeals for the Second Circuit (Appendix, *infra,* pp. 1a-4a).

Indictment 82 CR 336, filed in the Eastern District of New York on July 1, 1982, charged eight individuals, among them John O'Neill, with three counts of violations of the federal narcotics laws. The gravamen of the

indictment concerned the interception of approximately six hundred ten pounds of cocaine that had been flown into Long Island's Brookhaven Airport from Medillin, Colombia on June 24, 1982 and the arrests of three individuals who attempted to remove the narcotics from the airport — Bryan Monaghan, David Silbergeld and Fernando Alzate. The charged conspiracy centered around the activities of three principals — David Silbergeld, Bernard (Bryan) Monaghan, and Robert Humeston — whom it was alleged arranged for the purchase of a quantity of cocaine in Medillin, Colombia. It was alleged that the principals flew down to Colombia from Long Island on or about June 22, 1982 and returned to Brookhaven Airport on June 24, 1982, whence they were arrested by federal and state law enforcement authorities.

With the principals having pleaded guilty prior to trial, trial proceeded against John O'Neill and co-defendants Joseph Maschi and Paul Derpich, all of whom were charged as aiders and abettors. The Government's principal witness was Hugh Edgar Ratcliffe, a long-time Georgia drug smuggler turned undercover informant (Tr. 153-56, 162). Ratcliffe testified that, in February 1981, he received a telephone call from Bryan Monaghan, who said that he came highly recommended as a good pilot who could be trusted (Tr. 165-66). Monaghan said that he wished to speak with him about a future venture (Tr. 166). Approximately one week later, Ratcliffe flew to New York and met with Monaghan and David Silbergeld at Silbergeld's New York apartment (Tr. 166, 168-69). The three discussed the possibility of a future cocaine importation arrangement, the mechanics of delivery, the kind of aircraft capable of making such a flight and the method of landing.

Ratcliffe next came to New York in November 1981 and spent three days with Monaghan (Tr. 185). During this visit, he and Monaghan drove out to the Suffolk County Airport in Westhampton, where the two of them inspected a Huntington Pembrook Bomber that was

stored in one of the airport hangars to assess its airworthiness (Tr. 189-94). The two thereupon went into the airport terminal and spoke with John O'Neill in the office of Malloy Air East (Tr. 194). Monaghan introduced Ratcliffe to O'Neill and they spoke generally about the Bomber's airworthiness certificates, permits and log books (Tr. 195). Significantly, no discussion was had with O'Neill about any proposed smuggling ventures. Ratcliffe did tell O'Neill about an ill-fated earlier smuggling trip in Georgia (Tr. 200-01) and O'Neill stated merely that he had "heard about" it (Tr. 195).

Shortly before they left, O'Neill walked into an adjoining room in which Ratcliffe and Monaghan were talking and told Monaghan to "have [his] buddy [i.e., Silbergeld] come out here and pick up his bag", pointing to a bag in the corner of the room. "I don't want that out here" (Tr. 203). When Monaghan asked what it was, O'Neill said, "Go look. It's full of...bullets" (Id.). When Monaghan asked what [his buddy] was doing with it, O'Neill replied, "I don't know, but I don't want it out here" (Tr. 204). After inspecting another plane in an adjoining hangar, Ratcliffe and Monaghan left the airport (Tr. 205).

Between November 1981 and March 1982, Ratcliffe had no further contact with Monaghan and Silbergeld (Tr. 210). In mid-March 1982, Ratcliffe, Silbergeld and codefendant Robert Humeston flew out to Eugene, Oregon, where they purchased a Cessna Titan 404 aircraft (Tr. 218). Ratcliffe and Humeston flew the plane back to New York and encountered substantial mechanical difficulties along the way (Tr. 219-222). Upon their return to New York, they parked the aircraft at MacArthur Airport on Long Island (Tr. 222).

In mid-April 1982, Ratcliffe flew the Cessna over to Malloy Air East in order to make repairs on the aircraft (Tr. 224). Upon his arrival, he and Humeston were greeted by O'Neill, who told them "to get [their plane] out of there" (Tr. 225). O'Neill told him to "[t]ell Bryan that you cannot work on it, that you can't have it here. I

don't want it here" (Tr. 231). O'Neill stated that he was being audited by the IRS and that he didn't want any further problems (Tr. 226, 231). Ratcliffe thereupon called Monaghan to have him try to persuade O'Neill to allow the aircraft to be worked on at the airport (Tr. 236). Monaghan was unable to get O'Neill to cooperate (Tr. 236), and, accordingly, Ratcliffe flew the Cessna back to MacArthur Airport (Tr. 239).

Ratcliffe's final encounter with John O'Neill occurred on the afternoon of June 22, 1982. In anticipation of their flight to Colombia to acquire the anticipated cache of cocaine, he and Humeston flew the Cessna from MacArthur Airport to Malloy Air East to fuel up for the flight (Tr. 282).[1] O'Neill routinely fueled up the plane, and the passengers, joined by Silbergeld and Monaghan, flew off (Tr. 287).[2] Along the way, the flight stopped as scheduled at Greenville, North Carolina to completely refuel (Tr. 288-89). The plane had not completely fueled at Westhampton (Tr. 421) and had not taken on sufficient fuel to make the nonstop seventeen hour trip directly to Colombia (Tr. 418-430). On the night of June 24, 1982, the codefendants flew back to Long Island from Colombia, landing at Brookhaven and MacArthur Airports, where they were arrested (Tr. 307-08). Significantly, they had not attempted to land at Westhampton or to have any further contact with John O'Neill.

Ratcliffe thus testified to only three meetings with John O'Neill. Significantly, he never recounted any discussions of proposed smuggling operations with O'Neill. Indeed, at their April 1982 meeting, O'Neill peremptorily threw him out of the airport. And in June

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[1] Notably, Ratcliffe admitted that it was his idea — rather than that of his coconspirators — to take the aircraft to Malloy Air East to have it fueled (Tr. 283-84).

[2] On cross-examination, it was revealed that the fuel was paid for by check with a regularly-issued receipt from Malloy Air East (Tr. 439-42; DX B).

1982, O'Neill simply fueled his aircraft without any discussion whatever. In order to thus buttress its less than overwhelming case, the Government produced two additional witnesses against O'Neill — individuals who knew him from the Westhampton Airport, and who, it was revealed on cross-examination, bore him grave personal animus.

Clifford Rice, a fixed base operator at the Suffolk County Airport, was the President of Elm Air Services, Inc. and a direct competitor of O'Neill and Malloy Air East in Westhampton (Tr. 570-71). Rice testified to having seem Monaghan and Silbergeld at the airport on numerous occasions in 1981 and 1982 and, in fact, to having been introduced to them by O'Neill (Tr. 572). Monaghan was introduced as a movie producer who was going to produce a movie in South America and Silbergeld as Monaghan's attorney (Tr. 572). Rice also testified to having seen the Pembrook Bomber parked at the airport and occasionally worked on by Robert Humeston (Tr. 574). On June 22, 1982, he saw O'Neill fuel up the Cessna aircraft (Tr. 581). He had never before seen him fuel up an aircraft (Tr. 581).[3]

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[3] On cross-examination, however, it developed that Rice bore substantial animus to John O'Neill. Rice believed that the Malloy Air East fixed base operation was illegal under the Airport and Airways Development Act of 1970, thought that the County had entered into an illegal contract with Malloy Air East and had written the County on at least ten occasions to get the Malloy contract rescinded (Tr. 590-95). He candidly admitted disliking O'Neill (Tr. 596), but denied knowing that O'Neill had complained against him to the Federal Aviation Administration because of a plane crash on one of his charters (Tr. 604-606) and to the Immigration and Naturalization Service because of a flight school he was running for Pakistanis (Tr. 607-08). He did admit, however, that he had tried several times to hurt O'Neill in business over the past few years (Tr. 6ll), had mounted an extensive letterwriting campaign against O'Neill (Tr. 613-14) and was benefitting financially because of Malloy Air East's (and O'Neill's) present difficulties (Tr. 612).

Moreover, Rice's statement that he had never before seen O'Neill fuel a plane was rebutted by the testimony of five defense witnesses — among them, an Air Commander of the National Guard (Tr. 948-952) — who testified that O'Neill refueled planes "frequently", "many times", "more than a dozen times" (e.g., Tr. 948, 952, 962, 985, 989).

Ralph Burns, a former security officer at the Suffolk County Airport, testified that sometime in July or August, 1981 — one year before the June 1982 trip to Colombia — John O'Neill approached him with an offer of $20,000 if he was willing to leave the airport on some unspecified future night shift while a plane was landed and off-loaded. He expressed interest in the deal and several weeks later spoke to O'Neill about it again. O'Neill told him the deal was off (Tr. 628-31). Thereafter, in September 1981, he observed Monaghan and O'Neill in back of the terminal building at the rear of O'Neill's car. As he drove by, he saw O'Neill place a Uzi machine gun in his trunk (Tr. 632-33).[4]

Reasons for Granting the Writ

Petitioner's Mere Provision of Lawful Goods and Services Is Insufficient to Render Him Liable As a Conspirator or an Aider and Abettor in the Absence of Proof That He Was an Intentional Participant With a Stake in the Venture

This is a case ideally suited to Supreme Court review. It presents a substantial question of substantive criminal law which has not been considered by this Court for almost forty years and which is ripe for review — the question of whether the mere provision of lawful goods and services — standing by itself — is sufficient to render an individual liable as a conspirator or an aider and abettor in the absence of proof that he was a knowing and intentional participant with a stake in the venture.

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[4] Like Rice, Burns' credibility was not beyond reproach. He acknowledged that he no longer worked at the airport and that John O'Neill had made complaints against him for, *inter alia*, sleeping on the job, having pulled a gun on a Malloy employee whom he had wrongly accused of theft, and having taken $300 from O'Neill's office (Tr. 635-38). He also admitted being good friends with Cliff Rice but denied knowing of Rice's animus towards O'Neill or his letterwriting campaign against him (Tr. 639-42).

In analyzing the miniscule quantum of proof of O'Neill's direct involvement in the activities of the other defendants — predicated primarily upon his fortuitously having filled the gas tank of an aircraft as it was about to depart on a smuggling venture — several additional factors require consideration before it may properly be concluded that he participated with the requisite intent to further the conspiracy or consciously promote it as his own.

"Knowledge that a crime is being committed, even when coupled with presence at the scene," *United States v. Garguilo,* 310 F.2d 249, 253 (2d Cir. 1962), without more, is generally insufficient to prove participation in a conspiracy. *United States v. Terrell,* 474 F.2d 872, 875 (2d Cir. 1973). See also, *United States v. Fantuzzi,* 463 F.2d 683 (2d Cir. 1972) (conspirator must make an "affirmative attempt" to further the purposes of the conspiracy); *United States v. Steward,* 451 F.2d 1203, 1206 (2d Cir. 1971) (Mere presence of armed chauffeur of car carrying drug seller and his wares to motel where sale took place insufficient to convict chauffeur of aiding and abetting in absence of showing of chauffeur's actual or constructive possession of drugs).[5]

This test is equally applicable to aiding and abetting as to conspiracy. As noted by Judge Friendly in analyzing the applicable legal standard:

> The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or the mere negative acquiescence by a defendant

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[5] Moreover, for a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be of such a magnitude from which such knowledge may reasonably be inferred. *United States v. DeNoia,* 451 F.2d 979, 981 (2d Cir. 1971); *Cf. United States v. Tramunti,* 513 F.2d 1087, 1112 (2d Cir. 1975) (and cases cited therein).

> in the criminal conduct of others, even with guilty knowledge, is not sufficient to establish aiding and abetting. An aider and abettor must have some interest in the criminal venture.
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> *United States v. Stanchich,* 550 F.2d 1294, 1300 (2d Cir. 1977).

See also, *Nye & Nissen Corp. v. United States,* 336 U.S. 613, 619 (1949), *quoting in part, United States v. Peoni,* 100 F.2d 401, 402 (2d Cir. 1938) (L. Hand, J.).

This "stake in the venture" test derives from Learned Hand's formulation in *United States v. Falcone,* 109 F.2d 579 (2d Cir.), *aff'd,* 311 U.S. 205 (1940), wherein the Second Circuit considered virtually the identical question to that presented in the case at bar — the problem of determining under what circumstances the supplier of legitimate goods or services to a criminal undertaking becomes a party to the conspiracy.[6]

In *Falcone,* the evidence consisted of proof that the defendant sold sugar to grocers in New York State

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[6] The commentators similarly have focused on intent to further the conspiracy, rather than mere knowledge of the conspiracy coupled with acting in a way that incidentally benefits it, as the hallmark of intentional participation. As stated by Professor LaFave:

> "[Since] it is intent rather than knowledge which is usually required...the question is when the circumstances will suffice to show that the supplier shared the intent to achieve the criminal objective."
>
> W. LaFave & A. Scott, *Handbook on Criminal Law* § 61 at 466 *passim* (1972).

And as Professor Marcus has stated rhetorically:

> "[If mere] knowledge and actual support [without intent] can equal membership in a conspiracy, does that mean that the grocer who sells food to the conspiring bank robbers (with knowledge of their plans) is a conspirator? *Is the knowledgeable car mechanic who tunes the auto of an armed robber also a conspirator?*"
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> P. Marcus, *The Prosecution and Defense of Criminal Conspiracy Cases,* § 2.09[5][b] at 2-70 (1978) (emphasis supplied).

and that the sugar was sold in tremendous quantities. The evidence also indicated, according to Judge Hand, that the sugar was being utilized for illegal stills and that Falcone was on "notice that his customers were supplying the distillers" (109 F.2d at 580). The sale of sugar was, of course, quite lawful, yet the Government charged Falcone on the theory that he knew of the existence of the conspiracy, was actually aiding it, and fully intended to do so because he profited from his association with the conspiracy. Judge Hand rejected this argument, even though he conceded that Falcone knew of the use of the sugar for illegal purposes:

> There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders...We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do was toto coelo different from joining with them in running the stills.
>
> 109 F.2d at 581.

The convictions were thus reversed because the knowledge, actual aid, and profit, taken together, were not

enough to demonstrate "a purpose to do what the law in fact forbade." 109 F.2d at 582.[7]

The parallel to the instant case is striking. In the case at bar, Ratcliffe testified to three meetings with John O'Neill. At the first meeting, in November 1981, they discussed repairs on Monaghan's Pembrook Bomber and how it might be rendered airworthy. No discussion of narcotics or smuggling operations was alleged to have occurred (other than Ratcliffe's recounting his own previous pre-conspiracy misadventures) and the conversation focused strictly on repairing and flying the Pembrook aircraft. (Indeed, the conversation focused in the abstract on what would have to be done to repair the plane, rather than on any contemplated steps O'Neill would take). While the tenor of the conversation may have alerted O'Neill to the fact that Ratcliffe had previously been involved in otherwise shady operations, nothing was said which could even remotely suggest that O'Neill contemplated assisting or participating in any manner with Monaghan or Ratcliffe in any contemplated future illegal activities.[8]

The second meeting — in April 1982 — was even more summary than the first. When Ratcliffe flew the recently-acquired Cessna aircraft to the Suffolk County Airport to have it repaired, O'Neill chased him out, refusing to work on it at all or even to allow it to remain at the airport. Stating that he didn't wish any "problems" from them or their aircraft, O'Neill banished them from the field and categorically refused Monaghan's

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[7] Before this Court, the Government attempted to avoid the result by shifting to a theory that the suppliers had aided and abetted a conspiracy. The Court affirmed nonetheless, holding that the evidence did not demonstrate the suppliers knew that a conspiracy existed between others. 311 U.S. at 208.

[8] Indeed, as noted *supra*, the fact that O'Neill told Monaghan to tell "his buddy" to get his bag out of the airport carries the exact opposite inference — that O'Neill, a legitimate businessman, wished to limit his involvement with these individuals to strictly legitimate activities.

telephone entreaties that he allow the plane to remain. The Cessna was thus returned to MacArthur Airport, where it was hangared. O'Neill performed no repairs on the aircraft.[9]

Finally, there is the June 22, 1982 encounter. Ratcliffe testified that he took the Cessna from MacArthur Airport to Westhampton for refueling.[10] The plane was fueled by O'Neill — albeit, significantly, not filled to the brim, which is what would have been required for a non-stop flight to Colombia. The fuel was paid for by check and a regular receipt was issued by Malloy Air East. The flight landed in North Carolina for refueling, proceeded directly to Colombia and, upon its return two days later, landed not in Westhampton, but at MacArthur and Brookhaven Airports.

This, then, was the total extent of Ratcliffe's testimony as to O'Neill's direct involvement with the conspiracy. No inculpatory coconspirator declarations were elicited from the codefendants about O'Neill nor did O'Neill make any inculpatory admissions to Ratcliffe. Indeed, the manner of O'Neill's dealings with Ratcliffe, Monaghan and Silbergeld indicated no affirmative efforts on his own to in any way further the con-

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[9] Nor, for that matter, was any evidence adduced that O'Neill ever performed repair work on any of Monaghan's planes. The evidence indicated merely that O'Neill rented hangar space and that others — e.g., Humeston — performed whatever repairs were made.

[10] It is significant that Ratcliffe admitted at trial that it was *his* idea — rather than the suggestion of the other conspirators — that he obtain fuel from O'Neill. His motivation may well have stemmed from the fact that, to that point, O'Neill had hardly behaved in a manner consonant with membership in the smuggling conspiracy and this fuel stop provided a final opportunity to elicit an overt (albeit perfectly legal) act from O'Neill. Of course, merely performing an act which incidentally benefits a conspiracy hardly renders one a conspirator unless the act is knowingly performed and done with the intent to further the conspiracy. *Cf. United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976). No evidence was adduced that, in conversation or otherwise, O'Neill was informed or otherwise knew that the flight was going to Colombia to smuggle cocaine.

spiracy, ratify its objectives or otherwise join himself within its ambit. O'Neill rented them hangar space, advised them on repairing and flying their planes (without repairing them himself) and, on one fateful occasion, filled their gas tank. Such evidence of mere association, without more, however, is hardly sufficient to sustain his membership in the conspiracy or render him an aider and abettor of the substantive offenses, absent affirmative indication that O'Neill sought to affirmatively profit from the venture or had some sort of "stake in the venture", as noted in *Falcone.*

In *Direct Sales Co. v. United States,* 319 U.S. 703 (1943), the Supreme Court considered *Falcone's* "stake in the venture" test in the context of a company selling legitimate pharmaceuticals to a physician in such quantities that, "it must have been known he could not dispense the amounts received in lawful practice and was therefore distributing the drug illegally" 319 U.S. at 705. In holding the company liable as having an "unlawful intent to further the buyer's project" (319 U.S. at 715) the Court made the following observation with respect to the degree of knowledge imputed to the seller:

> When the evidence discloses such a system, working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. *And there is also a "stake in the venture" which, even if it may not be essential, is not irrelevant to the question of conspiracy.* Petitioner's stake here was in making the profits which it knew could come only from its encouragement of Tate's illicit operations. 319 U.S. at 713. (Emphasis added.)

Lower courts and commentators have also placed reliance on the factors stressed in *Direct Sales* — the quantity of the sales, the continuity of the relationship between buyer and seller, the seller's initiative or encouragement and the nature of the goods:

> The failure of the seller to submit sales reports required by Government regulations has also been considered relevant as has the failure to keep the usual business records or other secretive techniques. Intent may also be inferred from the fact that the seller has made inflated charges, that he has supplied goods or services which have no legitimate use, or that sales to the illegal operation have become the dominant proportion of the seller's business.
>
> W. LaFave & A. Scott, *Criminal Law, supra,* § 61 at 467 (collecting cases).

Analysis of these factors plainly demonstrates that O'Neill's contacts with the conspiracy were hardly of the magnitude that would allow the reasonable inference that he was either a conspirator or an aider and abettor with a "stake in the venture." The evidence adduced indicated that he rented hangar space to Monaghan and advised him on repairs and airworthiness of his aircraft but, significantly, did not do the repairs himself. Nor did O'Neill derive any profit from his legitimate business arrangment with the conspirators or contemplate sharing in the proceeds of the venture. *Cf. United States v. Terrell,* 474 F.2d at 876. There was no evidence that he charged other than customary rates for the services he rendered. Indeed, when he sold the conspirators fuel on June 22, 1982, it was paid for by check with a customary receipt issued in the regular course of business by Malloy Air East. This was hardly the action of a secretive conspirator who wished to keep the clandestine nature of the operation (and his relationship with it) from prying eyes.

Finally, there was the fact that the plane was not fueled with enough gas at Westhampton to go non-stop

to Colombia. In the absence of evidence that O'Neill knew that the plane was destined for Colombia — there was none adduced at trial — it is simply too great a jump in logic or common sense to impute this knowledge to O'Neill or to predicate liability — either as a conspirator or an aider and abettor — on the basis of his having partially filled the aircraft's gas tank. To paraphrase Professor Marcus' hypothetical, *ante,* to hold O'Neill liable would be tantamount to holding liable the proverbial garage mechanic who filled the gas tank of the bank robbers' getaway car. *Cf. United States v. Gallishaw,* 428 F.2d 760 (2d Cir. 1970) (weapons' supplier who knew merely in a general way that a machine gun was to be used to "pull something" could not be said to have specific intent necessary to join conspiracy to rob bank).

Under these stringent legal standards, then, it is clear that Ratcliffe's testimony that O'Neill fueled the Cessna — when viewed in conjunction with the otherwise arms-length basis upon which he kept the other members of the conspiracy — is a plainly insufficient basis upon which to predicate O'Neill's liability either as a conspirator or an aider and abettor.

Under *Falcone, Direct Sales* and *Gallishaw,* a simple purveyor of legitimate goods or services cannot be held liable where there has been no demonstration that the purveyor had any "stake in the venture" or a specific intent to further the conspiracy, ratify its objectives or make it his own. There has been no such proof in this case.

O'Neill's convictions for conspiracy and for the concomitant substantive offenses must, accordingly, be reversed.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 10, 1983

Respectfully submitted,

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APPENDIX

Appendix
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of April, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE WILLIAM H. TIMBERS,

HONORABLE THOMAS J. MESKILL,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

against

JOHN O'NEILL and JOSEPH MASCHI,
Defendants-Appellants.

82-1419

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are AFFIRMED.

Appellants O'Neill and Maschi argue that the evidence in this case was insufficient to support their convictions. Appellants contend that mere presence at a crime, even with guilty knowledge, does not establish conspiracy or aiding and abetting. In addition, they contend that a supplier of legitimate goods does not become a co-conspirator unless he has a "stake" in the venture. However, this court has approved an aiding and abetting charge that required only that the defendant have "some interest in the criminal venture." *United States v. Stanchich,* 550 F.2d 1294, 1300 (2d Cir. 1977). In addition, this court has held that the test for conspiracy is whether the defendant "intended to further or promote the illicit scheme." *United States v. Rush,* 666 F.2d 10, 12 (2d Cir. 1981).

The jury evidently disbelieved appellants' claim that they acted simply as legitimate businessmen, concluding instead that they actively aided the conspiracy. From the evidence in the record, the jury could have believed among other things that O'Neill fueled the plane prior to its trip to Colombia, although he did not provide enough fuel for a direct flight, that it was unusual for O'Neill personally to fuel a plane, that he rented hangar space to the conspirators, that he stored ammunition and a blivet for them, that he had a machine gun in his car, that he falsely identified two conspirators to outsiders, and that at one point close to or within the time frame of this conspiracy he offered to pay the airfield security guard $20,000 to disappear while a plane was unloaded. In addition, the evidence shows that Maschi helped install the extra fuel line needed to fly to Colombia, that he brought spark plugs and a life raft for the plane, and that he searched the plane to make certain no transponder had been planted prior to the trip. Under these circumstances, we cannot say that there was insufficient evidence to support the jury's verdicts.

O'Neill also argues that there was insufficient independent, non-hearsay evidence that he was a conspirator to permit the admission of co-conspirator hearsay statements against him. We do not find this argument persuasive, in view of the evidence recited above.

O'Neill argues next that it was error to admit into evidence guns and cocaine seized from other defendants, particularly since defense counsel agreed to stipulate not only to the evidence but to the existence of the conspiracy as well. The government claims the cocaine was properly admitted to show how much space was needed in the plane; further, the government claims the weapons were properly admissible as "tools of the narcotics trade." *United States v. Viserto,* 596 F.2d 531, 537 (2d Cir.), *cert. denied,* 444 U.S. 841 (1979). After considering this evidence, we cannot say that it was so lacking in probative value or so prejudicial that the district court's decision to admit it was reversible error.

O'Neill also claims that evidence of other crimes was erroneously admitted. The prosecution elicited testimony that O'Neill had said a plane considered for use on the drug run had formerly "been in trouble," without further eliciting that the trouble was flying with illegal gas tanks. Since this evidence was prejudicial and unrelated to the current conspiracy, claims appellant, it should have been excluded. The same holds true, argues O'Neill, with respect to the testimony that O'Neill offered the airfield guard a bribe to absent himself from the airport. The government claims the bribe offer was relevant to show motive, opportunity and knowledge; at a minimum, it casts doubt on O'Neill's claim that he was simply a legitimate businessman selling his product to defendants, who were his customers, and had no knowledge that they were engaged in the criminal enterprise charged. The government adds that the question regarding the plane's history was asked to establish why that plane could not be used on the drug run. Again, after considering this evidence, we cannot say that its admission constituted reversible error.

Finally, Maschi claims the court's instructions on aiding and abetting improperly failed to state that knowledge and association alone are insufficient. We think the charge adequately set forth the relevant factors to be considered by the jury. *Cf. United States v. Clemente,* 640 F.2d 1069, 1079 (2d Cir.), *cert. denied,* 454 U.S. 820 (1981).

We have considered all of appellants' arguments and they do not persuade us to reverse. The judgments appealed from are affirmed, and the mandate shall issue forthwith.

WILFRED FEINBERG,
Chief Judge

WILLIAM H. TIMBERS,

THOMAS J. MESKILL,
Circuit Judges.